No. 347

In the Supreme Court of the United States

OCTOBER TERM, 1939

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented by cross-petition	2
Statement	2
Argument	4
Conclusion	12

CITATIONS

Cases:

Cole v. *Ralph*, 252 U. S. 286	5
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175	12
Hartmann v. *Sloan*, 99 F. (2d) 942, certiorari denied, 59 S. Ct. 487	8
Houston Oil Co. v. *Goodrich*, 245 U. S. 440	12
Langnes v. *Green*, 282 U. S. 531	4, 5
Lonabaugh v. *United States*, 179 Fed. 476	8
Morley Construction Co. v. *Maryland Casualty Co.*, 300 U. S. 185	5
Rose v. *St. Clair*, 28 F. (2d) 189	8
Story Parchment Co. v. *Patterson Parchment Paper Co.*, 282 U. S. 555	4
United States v. *Black*, 160 Fed. 431	8
United States v. *Carlisle*, 19 F. Supp. 927	8
United States v. *Hartmann* (W. D. Pa.), decided August 24, 1937	8
United States v. *Socony-Vacuum Oil Company, Inc., et al.*, No. 346, this Term	2
United States v. *Trenton Potteries Co.*, 273 U. S. 392	7, 9, 10

179620—39

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 347

SOCONY-VACUUM OIL COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 2488) is reported in 23 F. Supp. 937. The opinion of the Circuit Court of Appeals (R. 3911) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 27, 1939 (R. 3954). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure after Verdict in Criminal Cases.

QUESTIONS PRESENTED BY CROSS-PETITION

1. Whether the District Court had jurisdiction to try the petitioners.

2. Whether the failure to establish the guilt of certain trade-journal defendants constituted a failure to prove an essential allegation of the indictment relating to petitioners.

3. Whether there was sufficient evidence to go to the jury that petitioners' combination unreasonably restrained trade.

4. Whether in view of the action of the District Court in granting certain defendants new trials, its failure to grant new trials to petitioners constituted reversible error.

5. Whether certain remarks of Government counsel in closing arguments to the jury deprived petitioners of a fair and impartial trial.

STATEMENT

The Government has petitioned [1] for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Seventh Circuit reversing judgments of conviction by the District Court for the Western District of Wisconsin and remanding this case for new trials. The principal question presented by the petition is whether, as the court below held, the District Court had errone-

[1] *United States* v. *Socony-Vacuum Oil Company, Inc., et al.*, No. 346, this Term.

ously instructed the jury.[2] The facts of the case are set forth in the Government's petition (pp. 3–15).

Respondents in No. 346 (petitioners here) have filed a cross-petition for certiorari seeking review of five other questions. The first three of these were decided against them by the Circuit Court of Appeals, that court holding (1) that sales of gasoline by the defendants in the Western District of Wisconsin at prices intentionally raised and maintained by defendants' combination constituted overt acts which gave the District Court jurisdiction of the offense (R. 3942-44); (2) that the Government's failure to prove fraudulent complicity in the conspiracy by certain defendant trade journals did not constitute such a failure of proof as to require dismissal of the indictment as to the petitioners (R. 3936–38); and (3) that there was sufficient evidence to submit to the jury the question whether the combination unreasonably restrained trade (R. 3938–39).

The court expressly declined (R. 3935, 3950) to pass finally upon questions 4 and 5 but stated with respect to the latter that certain remarks of Gov-

---

[2] It is not clear from the opinion of the Circuit Court of Appeals whether the alleged error in the trial court's instruction was the sole ground for reversal. Consequently, the Government's petition also presented for review three subordinate questions which the Circuit Court of Appeals treated as possible grounds for granting the petitioners new trials (Pet., pp. 2–3, 25–26).

ernment counsel in closing arguments when "taken in connection with the misuse of the Grand Jury testimony * * * would present a very serious obstacle to the affirmance of the judgment."[3]

For the reasons hereinafter stated, the Government does not oppose the prayer of the cross-petition for review on certiorari of questions 4 and 5 but respectfully requests the Court to limit certiorari to those questions and to the questions specified in the Government's petition.

ARGUMENT

I

Questions 4 and 5, which were not finally passed upon by the Circuit Court of Appeals, involve issues which, if decided in favor of petitioners, would require new trials. If the Government's petition is granted without limitation, petitioners would be free to present their contentions with respect to those questions in the absence of a cross-petition because their contentions would support the judgment of the Circuit Court of Appeals ordering new trials. *Langnes* v. *Green*, 282 U. S. 531, 538–539; *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 560. Moreover, since the entire record will be before this Court, we submit that it would be to the best interests of all parties that all questions not decided by

[3] Because of this observation the Government in its petition requested certiorari on this question (Pet. pp. 2–3, 25–26).

the Circuit Court of Appeals be now passed upon by this Court in order to avoid further litigation in a case which has already consumed over three years. See *Cole* v. *Ralph*, 252 U. S. 286, 290. The Government, therefore, does not oppose the prayer of the cross-petition with respect to those questions.[4]

Questions 1, 2, and 3 stand on a different footing. They were considered and finally passed upon by the Circuit Court of Appeals. If certiorari is granted to review them, petitioners state that they intend to urge that the judgment of the Circuit Court of Appeals ordering new trials should be set aside with instructions to dismiss the indictment (Cross-Pet., p. 3). They could not, therefore, obtain this affirmative relief without a cross-petition and their right to certiorari must be determined by the criteria ordinarily applied to original applications for certiorari. *Langnes* v. *Green*, 282 U. S. 531, 537–539, *supra*; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190–192.

So tested, none of those questions, in the view of the Government, presents legal problems of general importance appropriate for review on certiorari, but each merely involves the application of

---

[4] The same end could, of course, be obtained by denying this petition and permitting the cross-petitioners to raise the issues in support of the judgment below. The division of the contentions, for purposes of briefing and argument, into two cases would, however, seem to be a more convenient arrangement; in addition, any doubt as to the issues being before the Court would be removed.

settled and undisputed principles of law to the facts peculiar to this case. Consequently, although we believe that this Court would affirm the holdings of the Circuit Court of Appeals on those points, we suggest the inappropriateness of those issues for certiorari and oppose certiorari on those questions.

If, as we contend, questions 1, 2, and 3 do not warrant certiorari, we submit that there is good reason to limit the writ to exclude them. The arguments on the other points presented by the petition and cross-petition will require lengthy briefs. The usual amount of time assigned for oral argument in this Court will not be sufficient to present adequately even those points. Limitation of the writ as requested will, therefore, enable the parties to devote their briefs and oral arguments entirely to issues which by reason of their importance deserve review by this Court or which have not yet been reviewed by an appellate court.

In the discussion which follows we shall briefly describe the nature of questions 1, 2, and 3, and point out the reasons why we believe they are inappropriate for certiorari.

II

Question 1 relates to the jurisdiction of the District Court to try the offense. The indictment charged [5] and the jury found under express in-

[5] Paragraph 18 of the indictment (R. 12–13) charged that the defendant oil companies conspired to, and did, raise and maintain spot market prices and "thereby intentionally in-

structions by the court[6] that the defendants combined together to raise and maintain not only the spot market prices but also their own selling prices throughout the Mid-Western marketing area, including the Western District of Wisconsin. The indictment charged, and the undisputed proof showed, that throughout the life of the conspiracy the defendants sold gasoline to jobbers and consumers in the Western District of Wisconsin at prices which the jury found were intentionally raised and maintained by the defendants. The Circuit Court of Appeals, therefore, held under the authority of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, that the sales in the trial district constituted overt acts which gave the District Court jurisdiction of the offense.

Petitioners do not contend that the holding of the court below conflicts with any decision of this Court or with any decision of any other circuit court of appeals involving the same questions, or, indeed,

---

creased and fixed" their own selling prices throughout the Mid-Western area, including the Western District of Wisconsin.

[6] The District Court charged the jury that it was not sufficient for it to find that the defendants conspired together to raise spot market gasoline prices, but that it must also find that the defendants combined together for the purpose of artificially raising and fixing the tank car prices of gasoline in sales in interstate commerce in the Mid-Western area, including the Western District of Wisconsin, and for the purpose of intentionally raising the general level of retail prices in said area (R. 2405, 2408, 2409, 2410, 2417).

involving the same statute.[7] While they rely upon certain cases[8] in the lower courts, these dealt with questions and statutes wholly dissimilar to those here involved; the Circuit Court of Appeals considered those cases and concluded that they were "not controlling" on the jurisdictional question, and, moreover, that the cases were not "even persuasive" (R. 3944).

Nor do the petitioners urge or show that the jurisdictional question is one of any public importance. Instead, it appears that the problem involved is merely one of applying settled and unquestioned legal principles to the somewhat unusual nature of the marketing structure in the petroleum industry in the Mid-Western area. The legal problem presented is, therefore, unlikely to arise again.

The chief ground urged by petitioners for review of this question is that one judge of the Circuit Court of Appeals dissented from the court's holding on this point. This is hardly a sufficient reason

---

[7] The jurisdictional sufficiency of the indictment was sustained not only by the trial court (R. 37–39) but by other courts where the indictment was challenged on this ground in removal proceedings. *United States* v. *Carlisle*, 19 F. Supp. 927 (S. D. Tex.); *United States* v. *Hartmann* (W. D. Pa.), decided August 24, 1937, and not yet reported; *Hartmann* v. *Sloan*, 99 F. (2d) 942 (C. C. A. 3d), certiorari denied, 59 S. Ct. 487.

[8] *Rose* v. *St. Clair*, 28 F. (2d) 189, 191 (W. D. Va.); *United States* v. *Black*, 160 Fed. 431, 435–436 (C. C. A. 7th); *Lonabaugh* v. *United States*, 179 Fed. 476, 481 (C. C. A. 8th).

for granting certiorari. Furthermore, whatever importance a dissenting opinion may ordinarily have, the significance of the dissent here is questionable in view of the tenuous nature of the argument of the petitioners to which the dissenting judge subscribed.[9]

Petitioners, in an effort to distinguish the *Trenton Potteries* case, argue that the only crime charged and proved here was a combination to raise and fix spot market prices and that this crime was completed when those spot market prices were raised. From this false premise they argue that the raising of selling prices in Wisconsin was a mere consequence of the completed crime. But, as the majority of the court below found (R. 3943), the only possible advantage which could accrue to the defendants through their activities was the increase of their own selling price. Consequently, while an intermediate object of the conspiracy was to raise and control spot market prices, another and much

[9] In one important respect the dissenting judge misunderstood the issue between the Government and the petitioners. The dissenting opinion shows that the writer thought that the Government contended that the overt acts in the Western District of Wisconsin consisted of sales of the gasoline purchased in the buying programs (R. 3952, 3953). In fact, the sales which the Government urged constituted overt acts were sales of the petitioners' own gasoline at the prices which the petitioners were able to fix by means of the buying programs. This misunderstanding of the dissenting judge may account for his conclusion that the sales were mere consequences of the combination and not in furtherance of its objectives.

more important one was to raise and control thereby the prices at which the defendants sold most of their gasoline. Their object in raising and controlling spot market prices outside the trial district was clearly not an end in itself but a means whereby the defendants could in turn raise and control their selling prices throughout the marketing area, including the trial district. Clearly, therefore, sales of gasoline in the trial district at those prices tended to effectuate the main object of the combination here in the same way that sales in the trial district tended to effectuate the object of the combination in the *Trenton Potteries* case to fix uniform selling prices.

III

The request that this Court grant certiorari on question 2 relating to an alleged failure of proof is not supported by any showing whatever that the question is one of public importance or that the holding of the Circuit Court of Appeals conflicts with any decision of this Court or of any other circuit court of appeals. Petitioners' own statement of reasons (pp. 7–8) shows that the question involves nothing more than the construction of a particular indictment in a particular case. Mere error, if any, in the construction adopted by the Circuit Court of Appeals is not, we submit, an adequate ground for certiorari.

Nor have the petitioners made any plausible showing of error in the holding of the Circuit Court of Appeals. Their argument revolves around the

dismissal (R. 902–903) of certain trade journal defendants [10] who were charged in the indictment with participating in the conspiracy by fraudulently publishing as prices paid by jobbers prices which the defendant companies paid in the buying programs (R. 16–17). Petitioners contend that this alleged falsification of prices by the journals was an essential part of the charge against the petitioners (Cross-Pet., p. 7). We submit, however, that a fair reading of the indictment can leave no doubt that the charge of falsification of prices related solely to the alleged criminal liability of the trade journals and that the means alleged to have been used by the petitioners in the effectuation of the conspiracy were complete without reference to the alleged illegal participation of the journals.[11] The

---

[10] These defendants were the publishers of the Chicago Journal of Commerce and Platt's Oilgram. The indictment was dismissed as to them on motion of the Government at the close of its case (R. 902–903).

[11] Paragraph 18 of the indictment (R. 12–13) charges the conspiracy. It alleges that the defendant oil companies conspired to, and did, raise and maintain spot market prices and "thereby intentionally increased and fixed" their own selling prices. Paragraph 19 (R. 13) alleges that the conspiracy was effectuated by the "following means," and specifies the buying programs. Paragraphs 20–23 (R. 13–16) describe the programs. Only after the buying programs, which are alleged in paragraph 19 to be the means by which the conspiracy was effectuated, are fully described are the trade journals charged with participating in the conspiracy. This charge is made in a separate paragraph (R. 16–17) specifically entitled "Participation of market journals," and the journals are charged only as aiders and abettors.

Circuit Court of Appeals, therefore, correctly held (R. 3936–37) that the charge against the trade journals was "in the nature of an additional count" which was not essential in charging the other defendants.

IV

By question No. 3 petitioners seek to challenge the sufficiency of the evidence to go to the jury on the question of the reasonableness of the restraint of trade. This issue, of course, depends upon an appreciation of all the evidence in the case which the Circuit Court of Appeals has already reviewed. Review by this Court, therefore, is neither required nor warranted. *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

CONCLUSION

It is respectfully submitted that the writ of certiorari should be limited to the questions presented in the Government's petition and to questions 4 and 5 of the cross-petition.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
JOHN HENRY LEWIN,
CHARLES H. WESTON,
GRANT W. KELLEHER,
Special Assistants to the Attorney General.

SEPTEMBER 1939.

U. S. GOVERNMENT PRINTING OFFICE 1939